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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

NO.

ROBERT P. BREWER,
Natural Guardian and Duly Appointed Next Friend of ROBERT C. BREWER,
Petitioner,

v.

LINCOLN NATIONAL LIFE INSURANCE COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
AND
BRIEF OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITION OF ROBERT P. BREWER FOR WRIT OF CERTIORARI

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MOTION OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Depressive and Manic Depressive Association ("NDMDA") moves the Court for leave to file the attached

brief in support of the petition of Robert P. Brewer for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit, which petition was filed with this court on May 1, 1991. The petitioner has consented to the NDMDA's brief; respondent Lincoln National Life Insurance Company has not.[1]

I. Nature of Applicant's Interest

The issue in this case is whether ERISA[2] requires health insurance companies to recognize manic depression (also known as bipolar affective disorder), an organically caused brain

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[1]NDMDA notes that in the Eighth Circuit, respondent enlisted the support of the Health Insurance Association of America as amicus curiae.

[2]Employment Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq.

disfunction, as a physical rather than a "mental" illness in determining benefits in employer sponsored group health insurance plans. NDMDA is the primary national organization representing people who suffer from manic depression and the families of those people.

NDMDA has 35,000 members and 205 chapters throughout the United States. There are as many as 2-1/2 million Americans who suffer from organic depressive and manic depressive illness. The insurance industry has traditionally refused to recognize the organic nature of this disease, choosing instead to classify it as a "mental" illness and thus paying the greatly reduced benefits payable for the treatment of ailments described by most insurance policies as "mental illnesses," "mental

or nervous disorders," or similar descriptions.

One of the primary goals of the NDMDA and its members is to achieve affordable health care services and to dispel the ignorance and prejudice that are the root causes of the discrimination that permeates the health insurance industry's disparate treatment of this illness. With proper diagnosis and treatment, most people with manic depression can lead normal, productive lives. Too often, however, the unavailability of adequate health care prolongs accurate diagnosis and prevents appropriate treatment. This tradition of neglect is what NDMDA seeks to reverse as much as it seeks to reverse the Eighth Circuit's decision denying full health care insurance benefits to Mr. Brewer's son.

II. The Individual Petitioner Cannot Speak for Other People With Manic Depression.

Petitioner, like millions of other people who have manic depression, was left to fight a lonely, expensive battle against a major insurance company. To his credit and to the credit of his counsel, he prevailed in the district court. The court of appeals, apparently influenced by the amicus brief filed by the industry trade organization, ignored the trial record and concluded, without any evidentiary support or citation, that illnesses should be classified by symptom rather than by cause. As discussed at greater lenth in the NDMDA's attached brief, this view represents a perpetuation of ignorance and bias against those who have brain disorders, like manic depression, that cause aberrant behavior.

In deciding whether to grant certiorari in this case, this Court should hear not only from the single petitioner and the health insurance industry--it should hear from the millions of Americans who are directly affected by the Eighth Circuit's ruling, especially in light of the confusion that ruling has caused by conflicting with the Ninth Circuit's decision in Kunin v. Benefit Trust Life Insurance Co., 910 F. 2d 534 (9th Cir., 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990).

Moreover, there are a number of cases pending in the federal courts that involve the issue presented in the instant case. NDMDA is sponsoring three class actions filed as a single case in the United States District Court for the Northern District of Illinois (Doe v. Guardian, Case No. 89 C 7955). That

case is currently awaiting ruling on the issue of class certification. NDMDA has been informed that other, individual cases have been filed in other districts. According to the amicus brief filed in the Eighth Circuit by the Health Insurance Association of America, there are "tens of thousands of other policies issued as part of employee benefits plans [that provide] lesser benefits for 'mental illnesses' than for other illnesses."

Obviously, the instant case impacts on far more employers, health insurance companies and beneficiaries than the two litigants in this case.

III. NDMDA Is in a Unique Position to Advance the Reasons This Court Should Grant Certiorari.

As demonstrated above, NDMDA's perspective is much broader than petitioner's individual interest in this litigation. The manifest importance of this case to literally millions of people with manic depression requires resolution of the conflict in the circuits and of the underlying issue that only this court can provide.

IV. CONCLUSION

For the foregoing reasons, NDMDA respectfully moves the Court for leave to file the attached brief as amicus curiae in support of the petition of

Robert P. Brewer for a writ of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

I. Interest of the Amicus Curiae . 2

II. Argument
This Court Should Resolve the Conflict in the Circuits by Granting Certiorari and Reversing the Opinion of the Eighth Circuit 6

III. Conclusion. 12

CASES CITED

Arkansas Blue Cross v. Doe, 73 S.W. 2d 429 (Ark. Ct. App. 1987) 4

Kunin v. Benefit Trust, 696 F. Supp. 1342 (C.D. Cal. 1988), Aff'd, 910 F. 2d 534 (9th Cir. 1990). 4

STATUTES CITED

ERISA, 29 U.S.C. § 1000, et seq. . . 11

OTHER CITATIONS

Chicago Tribune, December 27, 1990. . 8

Egeland, et al., "Bipolar Affective Disorders Linked to DNA Markers on Chromosome 11," 325 Nature 783 (1987). 3

Reifman and Wyatt, "Lithium: a Brake in the Rising Cost of Mental Illness," 37 Arch. Gen. Psychiatry 385 (1980). 3

Robert L. Williams, The Horror of Life (Univ. of Chicago Press, 1980) . 8

Overcoming Depression, Papolos and Papolos (Harper & Row, 1987). 3

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BRIEF OF NATIONAL DEPRESSIVE AND MANIC DEPRESSIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION OF ROBERT P. BREWER FOR WRIT OF CERTIORARI

This brief is being filed on behalf of the National Depressive and Manic

Depressive Association ("NDMDA") as amicus curiae, pursuant to order of this Court.[1]

I. Interest of the Amicus Curiae

NDMDA is the primary national organization representing people who suffer from manic depression (also known as bipolar affective disorder) and the families of such people. This disease is an organic disfunction that causes a chemical imbalance in the brain. Its symptoms include periods of severe despondency and depression (sometimes suicidal), and other periods of "manic" behavior such as delusions of grandeur and superactivity. The organic nature of this illness has been known for at

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[1]As set forth in NDMDA's attached motion for leave to file, petitioner consented to the filing of this brief; respondent did not.

least three decades, and approximately 80% of the patients with manic depression can be successfully treated with lithium carbonate.[2]

It has been estimated that one percent of the population suffers from manic depressive illness.[3] This translates into 2.5 million Americans who suffer from manic depression. 35,000 of these people, or their family members, are members of NDMDA, which was formed in 1986, and currently has 205 chapters throughout the country.

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[2]Reifman and Wyatt, "Lithium: a Brake in the Rising Cost of Mental Illness," 37 Arch. Gen. Psychiatry 385 (1980); for a comprehensive layman's guide to historical and modern research regarding manic depression, see, Overcoming Depression, Papolos and Papolos (Harper & Row, 1987).

[3]Egeland, et al., "Bipolar Affective Disorders Linked to DNA Markers on Chromosome 11," 325 Nature 783 (1987).

One of NDMDA's primary goals is to achieve affordable health care services for its members and others who suffer from this dreaded illness. A related goal is to destroy the mythology, ignorance and bias that are associated with manic depression, and that lie at the root of the discriminatory practice of the health insurance industry in labeling this disease as "mental," rather than physical, and paying vastly reduced benefits for its treatment.

The conflict between the circuits described in the petition herein has caused great confusion and prejudice to people who suffer from manic depression. After the victories in Arkansas Blue Cross v. Doe, 733 S.W. 2d 429 (Ark. Ct. App. 1987), and Kunin v. Benefit Trust, 696 F. Supp. 1342 (C.D. Cal. 1988), Aff'd, 910 F. 2d 534 (9th Cir. 1990),

cert. denied, ___ U.S. ___, 111 S. Ct. 581 (1990), NDMDA and its members had every reason to believe that they would achieve parity with people who suffer from other organic illnesses. After all, health insurance companies have traditionally paid full benefits for brain tumors, cerebral palsy and other organic illnesses that affect the brain.

The Eighth Circuit's opinion from which petitioner seeks a writ of certiorari represents a giant step backward and, as demonstrated below, a gross distortion of the realities of manic depression. NDMDA, therefore, speaks for literally millions of Americans in this effort to convince the Court to grant certiorari and reverse the Eighth Circuit.

II. ARGUMENT

This Court Should Resolve the Conflict in the Circuits by Granting Certiorari and Reversing the Opinion of the Eighth Circuit.

Just when NDMDA and its members thought that it was safe to assume that manic depression had been recognized as a physical, organic illness, unpreventable and chronic, the Eighth Circuit issued an opinion steeped both in ignorance of the record established by petitioner in the district court and in ignorance of the progress made by medical science in the past half century. The most egregious aspect of the Eighth Circuit's opinion, in NDMDA's view, is its conclusion (921 F. 2d at 154):

> "The cause of a disease is a judgment for experts, while laymen know and understand symptoms. Laymen undoubtedly are aware that some mental illnesses are organically caused while others are not; how-

> ever, they do not classify illnesses based on their origin. Instead, lay persons are inclined to focus on the symptoms of an illness; illnesses whose primary symptoms are depression, mood swings and unusual behavior are commonly characterized as mental illnesses regardless of their cause."

With all due respect, this statement is wholly unsupported by the record in this case, and is contrary to modern medical opinion. The Eighth Circuit's decision is wrong, and only this Court can resolve the injustice that it represents.

To be sure, in the dim past, people were institutionalized and branded with such labels as "insane" or "deranged" for aberrant behavior regardless of its cause. People were also thought to suffer and die from "the fever," "consumption," and other illnesses whose cause was unknown to our ancestors;

those illnesses are now known as pneumonia, tuberculosis, and influenza.

More to the point, in the nineteenth century people were institutionalized for "general paresis of the insane," now known as syphilis. As late as 1901, the medical community was debating whether clinical syphilis was caused by, or was the cause of, a "mental illness."[4] Judged by its behavior in the instant case, the health insurance industry would no doubt have sided with those who believed syphilis

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[4]Robert L. Williams, The Horror of Life (Univ. of Chicago Press, 1980), at p. 106. This book describes the treatment (and mistreatment) of syphilis victims among 19th century authors. Such ignorance, tragically, is not relegated to the distant past. As described in the December 27, 1990 Chicago Tribune, as recently as 1975 the Soviet Union classified people suffering from cerebral palsy as "mentally ill" and confined them to psychiatric wards.

was a "mental illness," and paid reduced benefits to its victims.

"Lay persons" and the courts do not and cannot ignore medical evidence relating to the cause of a disease. When the cause is known, illnesses are and should be referred to by the cause, not the symptoms. Manic depression is, without doubt, a physical, organic illness. It is successfully treated with a chemical, lithium, in the vast majority of cases. To hold that this illness should be categorized by its symptoms and not its cause, as the Eighth Circuit has done, reflects an archaic prejudice against people with this disease, and a rejection of medical fact.

Worse yet, the label of "mental illness" attached to victims of manic depression has in many, if not most, cases impeded proper diagnosis and

treatment of this disease because of the practices of health insurers like respondent in this case. Without proper medical care, often costly but just as often effective, millions of Americans will suffer needlessly.

The health insurance industry argues that such coverage will increase premiums. If this is true, NDMDA says so be it. The treatment of cancer, heart disease and AIDS also increases premiums. Certainly, the AIDS epidemic could not have been anticipated by the health insurance industry, and the long term, intensive treatment of that illness no doubt increased premiums unexpectedly. The health insurance industry, however, has no such excuse for not anticipating the incidence and treatment of manic depression, the cause

and effective treatment of which has been known for decades.

In any event, the scope and duration of this debate indicate the importance of this case far beyond the two litigants in the court below.[5] NDMDA submits that the vast number of people affected by the decision of the Eighth Circuit, the conflict between that decision and the decisions of other courts, and the importance of interpreting ERISA as it relates to these questions compels the granting of certiorari.

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[5]Indeed, the amicus brief filed below by the Health Insurance Association of American admits that there are "tens of thousands of other policies issued as part of employee benefits plans [that provide] lesser benefits for 'mental illnesses' than for other illnesses."

III. CONCLUSION

For the foregoing reasons, NDMDA supports the petition of Robert P. Brewer for a writ of certiorari to the Eighth Circuit, and the reversal of the ruling below.

Respectfully submitted,

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